

COPY

ORIGINAL FILED

E-Filing

DEC 20 11 10:36  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Brendan Cummings (CA Bar No. 193952)  
CENTER FOR BIOLOGICAL DIVERSITY  
P.O. Box 549  
Joshua Tree, CA 92252  
Phone: (760) 366-2232  
Facsimile: (760) 366-2669  
Email: bcummings@biologicaldiversity.org

Miyoko Sakashita (CA Bar No. 239639)  
CENTER FOR BIOLOGICAL DIVERSITY  
San Francisco Bay Area Office  
1095 Market Street, Suite 511  
San Francisco, CA 94103  
Phone: (415) 436-9682  
Facsimile: (415) 436-9683  
Email: miyoko@biologicaldiversity.org

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

BZ

C 06 7786  
Case No.:

CENTER FOR BIOLOGICAL DIVERSITY, a  
non-profit corporation,  
  
Plaintiff,  
  
v.  
  
CARLOS M. GUTIERREZ, Secretary of  
Commerce, and NATIONAL MARINE  
FISHERIES SERVICE,  
  
Defendants.

COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF

I. INTRODUCTION

1. In this civil action for declaratory and injunctive relief, Plaintiff Center for Biological Diversity ("the Center") challenges the failure of Defendants Carlos M. Gutierrez, Secretary of Commerce and the National Marine Fisheries Service (collectively "NMFS") to comply with the non-discretionary provisions of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"), with regard to the protection of the North Pacific Right Whale (*Eubalaena japonica*). Specifically, NMFS has failed to comply with the timelines contained in the ESA for responding to a petition filed by the

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

1 Center to list the species as “endangered” under the statute. 16 U.S.C. § 1533.

2 2. On August 19, 2005, NMFS received a petition from the Center seeking listing of the  
3 North Pacific Right Whale as “endangered” under the ESA. The North Pacific Right Whale, once  
4 numbering in the thousands and ranging from Baja California to Alaska, has been reduced to as few as  
5 100 whales and is generally considered the world’s most endangered whale. While the North Pacific  
6 and North Atlantic Right Whales are recognized by scientists as separate and distinct species, they are  
7 currently listed under the ESA as a single species, the Northern Right Whale. As such, the two species  
8 have not consistently been treated separately for purposes of implementing the ESA, and conservation  
9 efforts for the species have suffered as a result. Separate listing of the North Pacific Right Whale under  
10 the ESA would remedy this problem and focus the necessary resources on the species to aid in its  
11 recovery.

12 3. On January 26, 2006, NMFS made a positive initial finding on the Center’s petition,  
13 finding that it “presents substantial information indicating that the requested action may be warranted.”  
14 71 Fed. Reg. 4344. Under the ESA, once a positive initial finding on a petition is made, NMFS has one  
15 year from the date it received the petition to either issue a proposed rule listing the species or find that  
16 such listing is “not warranted.” 16 U.S.C. § 1533(b). Such a 12-month finding was due no later than  
17 August 19, 2006.

18 4. On October 6, 2006 the Center sent NMFS a 60-day notice of intent to sue as required  
19 by the ESA, putting the agency on notice that litigation would be filed if the required finding was not  
20 timely issued. Plaintiff has to date received no response from NMFS. This litigation necessarily  
21 followed. Plaintiff requests this Court to order NMFS to make the overdue 12-month finding on the  
22 petition by a date certain so that the North Pacific Right Whale will receive all the protections to which  
23 it is statutorily entitled and so desperately needs.

## 24 II. JURISDICTION, VENUE, and INTRADISTRICT ASSIGNMENT

25 5. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) & (g)  
26 (action arising under the ESA and citizen suit provision), 28 U.S.C. § 1331 (federal question), 5 U.S.C.  
27 § 702 (Administrative Procedure Act), and 28 U.S.C. § 1361 (Mandamus). The relief sought is  
28 authorized by 28 U.S.C. §§ 2201 (declaratory judgment) and 28 U.S.C. § 2202 (injunctive relief).

1           6.       Venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391(e).

2           7.       Pursuant to Local Rules 3-5(a) and 3-2(c) and (d), assignment of this case to the San  
3 Francisco or Oakland Division is appropriate.

4           8.       By written notice sent by certified mail on October 6, 2006 and received by the  
5 Secretary of Commerce on October 11, 2006 and the Director of NMFS on October 10, 2006, Plaintiff  
6 informed Defendants of their violations more than sixty days prior to the filing of this Complaint, as  
7 required by the ESA. 16 U.S.C. § 1540(g). Despite receipt of Plaintiff's notice letter, Defendants have  
8 failed to remedy their violations of the ESA.

9           9.       An actual, justiciable controversy exists between the parties within the meaning of 28  
10 U.S.C. § 2201.

11          10.       Plaintiff has no adequate remedy at law. Defendants' continuing failure to comply with  
12 the ESA will result in irreparable harm to the North Pacific Right Whale, to Plaintiff and Plaintiff's  
13 members and constituents, and to the public. No monetary damages or other legal remedy can  
14 adequately compensate Plaintiff, its members and constituents, or the public, for this harm.

15          11.       Plaintiff and Plaintiff's members and constituents are adversely affected or aggrieved by  
16 federal agency action and are entitled to judicial review of such action within the meaning of the ESA  
17 and the APA. Defendants' failure to comply with the ESA's mandatory deadlines prevents the  
18 completion of the listing process and therefore the implementation of measures to protect the North  
19 Pacific Right Whale pursuant to the ESA. Without the substantial protections of the ESA, North  
20 Pacific Right Whales are more likely to continue to decline and become extinct. Plaintiff is therefore  
21 injured because Plaintiff's use and enjoyment of areas inhabited by the North Pacific Right Whale  
22 described below is threatened by impacts to the species and its habitat. Defendants' failure comply  
23 with the ESA's deadlines has also resulted in informational and procedural injury to Plaintiff, because  
24 Plaintiff has been deprived of a timely opportunity to submit additional information and otherwise  
25 participate in the listing process in order to secure appropriate protective measures for the species.  
26 These are actual, concrete injuries to Plaintiff, caused by Defendants' failure to comply with the ESA,  
27 the APA, and their implementing regulations. The relief requested will fully redress those injuries.

28          12.       The federal government has waived sovereign immunity in this action pursuant to 16

1 U.S.C. § 1540(g) and 5 U.S.C. § 702.

2 **III. PARTIES**

3 13. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a non-profit  
4 501(c)(3) corporation with offices in San Francisco, Joshua Tree, and San Diego, California; as well as  
5 in Arizona, New Mexico, Oregon; and Washington, D.C. The Center is actively involved in species  
6 and habitat protection issues, including protection of marine mammals in general and the North Pacific  
7 Right Whale in particular. The Center has over 25,000 members throughout the United States and the  
8 world.

9 14. The Center brings this action on its own institutional behalf and on behalf of its  
10 members, some of whom regularly enjoy and will continue to enjoy observing and studying, and  
11 attempting to observe and study, North Pacific Right Whales in the North Pacific Ocean, and as they  
12 migrate along the coast of California and other portions of the Pacific Coast, as well as in the Bering  
13 Sea and Sea of Okhotsk. In addition to the petition to separately list the North Pacific Right Whale  
14 under the ESA, the Center has previously petitioned Defendants to designate critical habitat for the  
15 Right Whale in the North Pacific Ocean, and has expended significant organizational resources on  
16 advocacy and public education efforts aimed at expanding protections for Right Whales in the Pacific  
17 Ocean. The interests of the Center and its members in observing, studying, and otherwise enjoying the  
18 North Pacific Right Whales in the Pacific Ocean and along the Pacific Coast have been, and will  
19 continue to be, harmed by defendants’ failure to separately list the species under the ESA as requested  
20 in the Center’s petition. The interests of the Center and its members in obtaining and disseminating  
21 information regarding the plight of the North Pacific Right Whale are also impaired by Defendants’  
22 violations of the ESA and APA.

23 15. Plaintiff’s members and staff include individuals with varying interests in North Pacific  
24 Right Whales and their habitats ranging from scientific, professional, and educational to recreational,  
25 aesthetic, moral, and spiritual interests. Further, Plaintiff’s members and staff enjoy, on an on-going  
26 basis, the biological, scientific, research, education, conservation, recreational and aesthetic values of  
27 the regions inhabited by this species. Plaintiffs’ staff and members observe, or attempt to observe and  
28 study North Pacific Right Whales and their habitat, and derive professional, scientific, educational,

1 recreational, aesthetic, inspirational, and other benefits from these activities and have an interest in  
2 preserving the possibility of such activities in the future. Plaintiff brings this action on its own behalf  
3 and on behalf of its adversely affected members and staff.

4 16. Defendant CARLOS GUTIERREZ, United States Secretary of Commerce, is the highest  
5 ranking official within the Department of Commerce and, in that capacity, has ultimate responsibility  
6 for the administration and implementation of the ESA with regard to the North Pacific Right Whale,  
7 and for compliance with all other federal laws applicable to the Department of the Commerce. He is  
8 sued in his official capacity.

9 17. Defendant NATIONAL MARINE FISHERIES SERVICE ("NMFS") is a federal  
10 agency within the Department of Commerce authorized and required by law to protect and manage the  
11 marine resources of the United States, including enforcing the ESA. NMFS is sometimes referred to as  
12 "NOAA Fisheries." NMFS has been delegated authority by the Secretary of Commerce to implement  
13 the ESA for the North Pacific Right Whale, including responsibility for making decisions and  
14 promulgating regulations, including proposed and final listing decisions and the processing of petitions  
15 for such listings. NMFS has failed to publish a 12-month finding on the petition to list the North  
16 Pacific Right Whale under the ESA.

#### 17 IV. LEGAL BACKGROUND

18 18. The ESA is a federal statute enacted to conserve endangered and threatened species and  
19 the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The ESA "is the most comprehensive  
20 legislation for the preservation of endangered species ever enacted by any nation." Tennessee Valley  
21 Authority v. Hill, 437 U.S. 153, 180 (1978). The Supreme Court's review of the ESA's "language,  
22 history, and structure" convinced the Court "beyond a doubt" that "Congress intended endangered  
23 species to be afforded the highest of priorities." Id. at 174. As the Court found, "the plain intent of  
24 Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever  
25 the cost." Id. at 184.

26 19. The ESA assigns responsibility to implement the statute to the Secretaries of Commerce  
27 and Interior, which in turn have delegated responsibility to NMFS and the U.S. Fish and Wildlife  
28 Service ("FWS") respectively. Generally, NMFS has jurisdiction over marine species such as the

1 North Pacific Right Whale, while FWS has jurisdiction over terrestrial species. The ESA protects  
2 species listed as either "endangered" or "threatened" by NMFS or FWS. A species is "endangered" if it  
3 "is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A  
4 species is "threatened" if it is "likely to become an endangered species within the foreseeable future."  
5 16 U.S.C. § 1532(20)

6 20. Once a species is listed, an array of statutory protections applies. For example, Section  
7 7 requires all federal agencies to "insure" that their actions neither "jeopardize the continued existence"  
8 of any listed species nor "result in the destruction or adverse modification" of its "critical habitat." 16  
9 U.S.C. § 1536(a)(2). Section 9 and its regulations further prohibit, among other things, "any person"  
10 from intentionally "taking" listed species or "incidentally" taking listed species without a permit from  
11 NMFS. 16 U.S.C. §§ 1538(a)(1)(B), 1539. Other provisions require NMFS to designate "critical  
12 habitat" for listed species, 16 U.S.C. § 1533(a)(3), require NMFS to "develop and implement" recovery  
13 plans for listed species, 16 U.S.C. § 1533(f), authorize the acquisition of land for the protection of  
14 listed species, 16 U.S.C. § 1534, and make federal funds available to states to assist in their efforts to  
15 preserve and protect threatened and endangered species, 16 U.S.C. § 1535(d).

16 21. However, none of these protections come into force until a species is officially listed as  
17 threatened or endangered under the ESA.

18 22. In order to ensure the timely protection of species, Congress set forth the listing process  
19 described below. The process includes mandatory, non-discretionary deadlines for the three required  
20 findings that NMFS must meet, so that species in need of protection do not languish in administrative  
21 purgatory. The three required findings, described below, are the 90-day finding, the 12-month finding,  
22 and the final listing determination.

23 23. Any interested person can begin the listing process by filing a petition to list a species  
24 with NMFS. 16 U.S.C. § 1533 (b)(3)(A); 50 C.F.R. § 424.14(a).

25 24. Upon receipt of a petition to list a species, NMFS has 90 days "to the maximum extent  
26 practicable," to make a finding as to whether the petition "presents substantial scientific or commercial  
27 information indicating that the petitioned action may be warranted." 16 U.S.C § 1533 (b)(3)(A); 50  
28 C.F.R. § 424.14 (b)(1). If NMFS finds that the petition presents substantial information indicating that

1 the listing may be warranted, NMFS then publishes in the Federal Register a "90 day finding and  
2 commencement of status review." 16 U.S.C. § 1533(b)(3)(A).

3 25. Upon issuing a positive 90-day finding, NMFS must then conduct a full review of the  
4 status of the species. 50 C.F.R. 424.14. Upon completion of this status review, and within 12 months  
5 from the date that the agency received the petition, NMFS must make one of three findings: (1) the  
6 petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is  
7 warranted but presently precluded by other pending proposals for listing species, provided certain  
8 circumstances are present. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14 (b)(3). This second  
9 determination is known as a "12-month finding." This deadline is mandatory. There is no mechanism  
10 by which NMFS can extend the deadline for the finding.

11 26. If NMFS finds in the 12-month finding that the listing of the species is warranted, then  
12 the agency must publish in the Federal Register a proposed rule, for public comment, to list such  
13 species as endangered or threatened. 16 U.S.C. § 1533(b)(5).

14 27. Within one year of the publication of a proposed rule to list a species, the ESA requires  
15 NMFS to render a final determination on the proposal. 16 U.S.C. § 1533(b)(6)(A).

16 28. At such time, NMFS must either list the species, withdraw the proposal, or if there is  
17 substantial disagreement about scientific data, delay a final determination for up to six months to solicit  
18 more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(i)(III) & 1533(b)(6)(B)(i).

19 29. Concurrently with a final determination to list a species, NMFS must render a final  
20 decision concerning the designation of critical habitat for the species to the maximum extent prudent  
21 and determinable. 16 U.S.C. §§ 1533(a)(3) & 1533(b)(6)(C). If NMFS finds that designation of  
22 critical habitat is prudent, but is not currently determinable, then NMFS may extend the deadline to  
23 issue a final regulation concerning critical habitat by no more than one additional year. 16 U.S.C. §  
24 1533(b)(6)(C)(ii).

25 30. It is critical that NMFS scrupulously follow the ESA's listing procedures and deadlines  
26 if species are to be protected in a timely manner, because the ESA does not protect a species until the  
27 species is formally listed as threatened or endangered.

1 V. FACTUAL BACKGROUND

2 31. Plaintiff's petition to list the North Pacific Right Whale as an endangered species was  
3 submitted on August 16, 2005 and acknowledged as received by NMFS on August 19, 2005. As  
4 summarized below, the petition details the factors that threaten the North Pacific Right Whale with  
5 extinction.

6 32. The North Pacific Right Whale is a rotund, medium-sized baleen whale. Adults  
7 generally range in length between 45 and 55 feet and can weigh up to 70 tons. The Right whale's  
8 distinctive features include a black coloration with variable white patches on the throat and belly, the  
9 absence of a dorsal fin, a large head comprising more than one-quarter of the body length, a narrow  
10 upper jaw, a strongly boned lower jaw, and distinguishing callosities on the head.

11 33. The North Pacific Right Whale once ranged the North Pacific from Baja California to  
12 Alaska and across to Russia and Japan.

13 34. Right whales are protected in California as a "fully protected mammal," Cal. Fish and  
14 Game Code § 4700(f), and in the past decade have been seen in the Monterey Bay and off the Big Sur  
15 coast. Earlier sighting along the California coast range from Ft. Bragg in Mendocino County, the  
16 Farallon Islands in San Francisco County, Pigeon Pt. and Pt. Montara in San Mateo County, and down  
17 the coast to Santa Barbara and San Diego Counties.

18 35. Right Whales were once abundant throughout the Pacific and Atlantic Oceans.  
19 Intensive commercial whaling during the 19<sup>th</sup> and 20<sup>th</sup> centuries decimated the two species. Prized for  
20 their oil and baleen plates – and preferred by hunters due to its slow swimming speed and the fact that  
21 its carcass would float rather than sink – commercial whalers severely depleted the Atlantic species by  
22 the late 1700's. Commercial whaling in the Pacific Ocean began later, but was even more devastating.  
23 American vessels killed and landed over 15,000 Right Whales in the North Pacific during the 1840's,  
24 with Japanese and later Soviet fleets killing additional thousands. A total of as many as 40,000 North  
25 Pacific Right Whales may have been killed by whalers.

26 36. Although commercial whaling of Right Whales continued into the 20<sup>th</sup> century, the  
27 numbers of Right Whales in both oceans were so low that Right Whales were no longer a primary  
28 focus of commercial whaling. By 1935, Right Whales were so near extinction that the League of



1 Nations convinced most whaling nations to agree to stop hunting Right Whales. However, because the  
2 Soviet Union and Japan refused to accept the whaling restrictions, the North Pacific Right Whale  
3 continued to be legally harvested by these countries. Not until 1949, with passage of the Convention  
4 for the International Regulation of Whaling, did the North Pacific Right Whale gain international  
5 protection from hunting.

6 37. Today there are approximately 350 individual Right Whales in the North Atlantic  
7 Ocean. Due to the whale's low birth rate and high human induced mortality, scientists predict that  
8 Right Whales in the Atlantic will go extinct within 200 years, unless the human-induced mortality is  
9 drastically lowered. There is no accurate abundance estimate for the North Pacific Right Whale, but  
10 prospects for recovery appear bleak in the absence of concerted conservation efforts and, indeed, until  
11 recently, the lack of sightings led many scientists to conclude that Right Whales were already  
12 effectively extinct in the North Pacific. In recent years, however, a small number of Right Whales have  
13 been consistently observed in the Bering Sea, raising hopes that the species may be recovered through  
14 strenuous conservation efforts.

15 38. The Right Whale was originally listed as endangered as a single species, *Eubalaena*  
16 *glacialis*, in the 1973 Edition of Threatened Wildlife of the United States. See 68 Fed. Reg. 17560  
17 (April 10, 2003)(Describing listing history). That listing covered both Pacific and Atlantic Right whale  
18 populations in the northern hemisphere.

19 39. In 1991, NMFS issued the "Final Recovery Plan for the Northern Right Whale"  
20 ("Recovery Plan"). The Recovery Plan called for the identification and protection of habitats essential  
21 to the survival and recovery of Right Whales in the Atlantic Ocean (i.e., their critical habitats) but,  
22 because the Pacific population was so low, see Recovery Plan at 47 ("there may be as few as 100 right  
23 whales in the North Pacific"), the recovery plan team could not determine what habitat areas were  
24 critical to the survival of Right Whales in that area. Nevertheless, the recovery team recommended  
25 that, once areas essential to the survival and recovery of North Pacific Right Whales were identified,  
26 those areas should be protected under the ESA. See Recovery Plan at 51 (NMFS should "[i]dentify and  
27 protect as necessary habitat(s) essential to the survival and recovery of the North Pacific right whale"  
28 and "North Pacific right whale habitats which have been newly discovered by satellite monitored

1 tagging studies or other research will need to be protected to insure the continued survival and eventual  
2 full recovery of the population”). The Recovery Plan also stated that “[u]nder the ESA, special  
3 emphasis should be placed on protection of essential northern right whale habitat in Section 7  
4 consultations carried out by all Federal agencies.” Recovery Plan at 31.

5 40. NMFS designated as critical habitat for Right Whales three areas in the North Atlantic  
6 Ocean off the eastern United States in 1994. See 59 Fed. Reg. 28793 (codified at 50 C.F.R. § 226.203).  
7 However, when nearly a decade had passed since issuance of the Recovery Plan and NMFS had still  
8 not designated any critical habitat for Right Whales in the Pacific, the Center submitted to NMFS, on  
9 October 4, 2000, a formal “Petition to Revise the Critical Habitat Designation for the Northern Right  
10 Whale (*Eubalaena Glacialis*) Under the Endangered Species Act.” The petition maintained that there  
11 were sufficient data to designate critical habitat for these whales in the Pacific because, “[o]ver the past  
12 five years, recurrent whale sightings along the middle shelf of the southeast Bering Sea indicate that an  
13 area essential to the conservation of the Pacific population has been discovered,” and that “this habitat  
14 must be protected as critical habitat for the right whale in order to protect the habitat from human  
15 encroachment and promote the recovery of the species.” Id. at 1.

16 41. The Center’s critical habitat petition described the best available data on Right Whales  
17 in the Pacific, including information relating to the biology, conservation, and taxonomy of the species.  
18 With regard to taxonomy, the petition noted that a “recent genetic and phylogenetic study indicates that  
19 classifying the North Pacific population as a separate species may be warranted.” Id. at 3. In any  
20 event, the petition presented substantial evidence that a small number of Right Whales are now using  
21 an area concentrated in the “middle shelf and inner front of the southeast Bering Sea,” but that these  
22 whales are threatened by a number of human activities, including significant risks from ship strikes, oil  
23 and gas development, industrial noise, and dredging and trawling activities. Id. at 9-15.

24 42. On June 1, 2001, NMFS published a positive 90-day finding on the critical habitat  
25 petition, explaining that “NMFS has reviewed the petition, the literature cited in the petition, and other  
26 literature and available information,” and that “[o]n the basis of that information, NMFS finds that the  
27 petition presents substantial scientific information indicating that the requested action may be  
28 warranted.” 66 Fed. Reg. 29774.

1           43.     Although NMFS received over 1,000 letters on the critical habitat petition during the  
2 subsequent comment period, almost all of which supported the designation of critical habitat, in a  
3 Federal Register notice published on February 20, 2002, NMFS responded to the petition by finding  
4 that the “petition is not warranted at this time,” although the agency stated that it “recognizes that the  
5 revision of critical habitat may be prudent, but finds that the extent of critical habitat cannot be  
6 determined at this time because the essential biological requirements of the population in the North  
7 Pacific Ocean are not sufficiently understood.” 67 Fed. Reg. 7660, 7661. NMFS stated that it would  
8 “continue to analyze the issues raised in the petition,” including by “continu[ing] with planned research  
9 activities during 2002 and evaluat[ing] any new information to better define the boundaries of an area  
10 that may be considered critical.” 67 Fed. Reg. 7665.

11           44.     While declining to designate critical habitat for Right Whales in the North Pacific  
12 Ocean, NMFS did indicate, in its February 20, 2002 Federal Register Notice, that it was planning on  
13 listing Right Whales in the North Pacific as a separate species – as had been suggested by the Center’s  
14 critical habitat petition. See 67 Fed. Reg. 7660 (“Recent genetic studies, however, provide conclusive  
15 evidence supporting separate species status for these populations, one in the North Atlantic and another  
16 in the North Pacific.”). NMFS further explained that the International Whaling Commission’s  
17 Scientific Committee “formally recognized a three species classification for right whales at its 2000  
18 meeting,” and that NMFS “has reviewed and concurs with the taxonomic changes suggested by the  
19 IWC and is working to have the right whale populations listed as distinct species” under the ESA. Id.

20           45.     On April 10, 2003, NMFS published a Federal Register Notice purporting to change the  
21 listing status of Right Whales so as to separately list the North Pacific Right Whale. See 69 Fed. Reg.  
22 17560 (Endangered Fish and Wildlife; Notice of Technical Revision to Right Whale Nomenclature and  
23 Taxonomy under the U.S. Endangered Species Act). The agency noted that “[r]efining the taxonomy  
24 of these endangered cetaceans is critical to the recovery planning and conservation of these species.”  
25 Id. at 17561.

26           46.     On October 25, 2004 the Center filed suit against NMFS over the agency’s failure to  
27 designate critical habitat for Right Whales in the North Pacific. Center for Biological Diversity, et al.,  
28 v. Evans, et al., C-04-4496-WHA (N.D. Cal.).

1           47.     While the critical habitat lawsuit was still pending, NMFS published a notice in the  
2 Federal Register rescinding the previous taxonomic revision of Right Whales and the separate listing of  
3 the North Pacific Right Whale. 70 Fed. Reg. 1830 (January 11, 2005) (Endangered Marine and  
4 Anadromous Species; Final Rule to Remove Technical Revisions to Right Whale Listing Under the  
5 U.S. Endangered Species Act). NMFS explained this decision on the grounds that separate listing of  
6 the North Pacific Right Whale would require notice and comment rulemaking.

7           [T]he final rule we published in April 2003 was procedurally and substantively flawed.  
8 First, we did not follow the public notice and comment procedural requirements outlined  
9 in section 4 for listing a species as endangered or threatened. Second, we did not meet the  
10 ESA's substantive requirements of conducting a review of the status of the species to  
11 determine whether each species is endangered or threatened as a result of any of the five  
12 listing factors in that section.

13 70 Fed. Reg. at 1831.

14           48.     NMFS stated that it would conduct a status review of all Right Whales and proceed with  
15 listing the North Pacific Right Whale if such listing proved warranted under the ESA. *Id.*

16           49.     The Center subsequently prevailed in its lawsuit regarding critical habitat on June 14,  
17 2005. Center for Biological Diversity, et al., v. Evans, et al., C-04-4496-WHA (N.D. Cal.)(June 14,  
18 2005 Order on Cross Motions for Summary Judgment). The Court ordered NMFS to reconsider its  
19 decision and, if appropriate, propose and finalize critical habitat rules for Right Whales in the North  
20 Pacific by dates certain. NMFS published a proposed critical habitat rule on November 2, 2005 (70  
21 Fed. Reg. 66332) and a final designation on July 6, 2006 (71 Fed. Reg. 38277).

22           50.     After NMFS rescinded the separate listing of the North Pacific Right Whale in January  
23 2005 (70 Fed. Reg. 1830), despite the agency's statements that it would promptly proceed with such  
24 listing on its own volition pursuant to the requirements of Section 4 of the ESA, the agency took no  
25 further action towards actually listing the species separately under the statute. Once again, the Center  
26 filed a petition requesting that the agency simply do what it had already promised it would do.

27           51.     The Center's petition to separately list the North Pacific Right Whale as "endangered"  
28 under the ESA was received by NMFS on August 19, 2005. NMFS made a positive initial or 90-day  
finding on the petition on January 26, 2006 (71 Fed. Reg. 4344). By law, NMFS was required to make  
a 12-month finding on the petition no later than August 19, 2006. The agency failed to do so. On

1 October 6, 2006, the Center sent NMFS a 60-day notice of intent to sue over the agency's failure to  
2 make the required finding. No response has been forthcoming. This litigation followed.

3 **VI. CLAIMS FOR RELIEF**

4 **CLAIM I**

5 **(Violation of Endangered Species Act, 16 U.S.C. § 1533(b)(3), for Failure to Make a 12-month**  
6 **Finding on the Listing Petition)**

7 52. Plaintiff realleges and incorporates by reference all the allegations set forth in this  
8 Complaint, as though fully set forth below.

9 53. NMFS's failure to make a 12-month finding on the petition to list the North Pacific  
10 Right Whale as an endangered species is a violation of the ESA and its implementing regulations. 16  
11 U.S.C. §§ 1533(b)(3)(B) & 1540(g). NMFS's failure to perform its mandatory, non-discretionary duty  
12 also constitutes agency action "unlawfully withheld or unreasonably delayed" within the meaning of  
13 the APA, 5 U.S.C. § 706(1). Additionally, and/or alternatively, NMFS's failure to comply with this  
14 provision is arbitrary and capricious, an abuse of discretion, not in accordance with law, and a failure to  
15 observe proper procedure under the APA, 5 U.S.C. § 706(2).

16 **VII. PRAYER FOR RELIEF**

17 For the reasons stated above, Plaintiff respectfully requests that the Court grant the following  
18 relief.

19 1. Declare that NMFS violated its non-discretionary duties under 16 U.S.C. §  
20 1533(b)(3)(B) of the ESA by failing to timely make a 12-month finding in response to the petition to  
21 list the North Pacific Right Whale under the ESA;

22 2. Issue permanent injunctive relief compelling NMFS to make and publish in the Federal  
23 Register a 12-month finding on the petition to list the North Pacific Right Whale under the ESA by a  
24 date certain;

25 3. Award Plaintiffs their costs of litigation, including reasonable attorneys fees; and

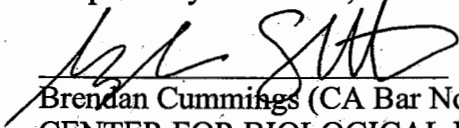
26 4. Grant Plaintiffs such other relief as the Court deems just and proper.

1 **VIII. CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

2 Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named  
3 parties, there is no such interest to report.

4  
5 DATE: December 20, 2006

Respectfully Submitted,

6 

7 Brendan Cummings (CA Bar No. 193952)  
8 CENTER FOR BIOLOGICAL DIVERSITY  
9 P.O. Box 549  
10 Joshua Tree, CA 92252  
11 Phone: (760) 366-2232  
12 Facsimile: (760) 366-2669  
13 Email: bcummings@biologicaldiversity.org

14 Miyoko Sakashita (CA Bar No. 239639)  
15 CENTER FOR BIOLOGICAL DIVERSITY  
16 San Francisco Bay Area Office  
17 1095 Market Street, Suite 511  
18 San Francisco, CA 94103  
19 Phone: (415) 436-9682  
20 Facsimile: (415) 436-9683  
21 Email: miyoko@biologicaldiversity.org

22  
23  
24  
25  
26  
27  
28  
Attorneys for Plaintiff